

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III

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IN THE MATTER OF: )

Ohio County Development Authority, )  
1500 Chapline Street, Room 215 )  
Wheeling, West Virginia 26003 )

Class II Proceeding Pursuant to  
Section 309(g)(2)(B) of the Clean Water  
Act, 33 U.S.C. § 1319(g)(2)(B)

Respondent. )

Dkt. No. CWA-03-2009 - 0020

Regarding Site identified as )  
The Highlands Lot 13C )  
Lat. 40.0593°N, Long. 80.5889°W )  
Located directly southeast of the )  
intersection of C.R. 65 (Cabela Drive), )  
Gantzer Road, and an on/off ramp of )  
Interstate 70, in Ohio County, )  
West Virginia )

CONSENT ORDER AND FINAL  
AGREEMENT

I. STATUTORY AND REGULATORY BACKGROUND

1. This Consent Agreement and Final Order ("CAFO") is entered into by the Director, Environmental Assessment and Innovation Division, United States Environmental Protection Agency, Region III ("Complainant") and the Ohio County Development Authority ("OCDA" or "Respondent"), pursuant to Section 309(g) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(g) and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules")*, 40 C.F.R. Part 22. The parties having agreed to settlement of violations of the CWA by Respondent described herein, this CAFO simultaneously commences and concludes this action pursuant to 40 C.F.R. § 22.13(b) and 22.18(b)(2) & (3), and 22.45. The Administrator has delegated the authority to take these actions to the Regional Administrator for Region III.

2. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of dredged and/or fill material from point sources to navigable waters (defined as "waters of the United States") except in compliance with a permit issued by the Secretary of the Army (acting through the U.S. Army Corps of Engineers ("Corps")) under Section 404 of the Act, 33 U.S.C. § 1344.

3. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as amended by the Debt Collection Improvement Act of 1996 (codified at 28 U.S.C. § 2461) and

the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, the Administrator of the United States Environmental Protection Agency ("EPA") is authorized after March 15, 2004, to issue an order requiring compliance and/or assessing administrative penalties against any person who has violated Section 301(a) of the CWA by discharging dredged and/or fill material to a water of the United States without a permit issued pursuant to Section 404 in an amount not to exceed \$ 11,000 per day for each violation, up to a total penalty amount of \$ 157,500.

## II. FINDINGS OF FACT, JURISDICTIONAL ALLEGATIONS AND CONCLUSIONS OF LAW

4. OCDA is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

5. OCDA owns and/or controls operations at a site known as "The Highlands Lot 13C," located at 40.0593°N, Long. 80.5889°W, southeast of the intersection of C.R. 65 (Cabela Drive), Gantzer Road, and an on/off ramp of Interstate 70, in Ohio County, West Virginia (hereafter "Lot 13C").

6. On information and belief, "The Highlands" is a retail center developed by OCDA. On information and belief, Respondent has sought and received authorizations from the U.S. Army Corps of Engineers for the discharge of dredged and/or fill material in connection with various phases of The Highlands project. On information and belief, development of Lot 13C is part of Phase XIII of the Highlands project.

7. Prior to August 2007, Lot 13C contained two unnamed tributaries to Middle Wheeling Creek. The two unnamed tributaries to Middle Wheeling Creek on Lot 13C were relatively permanent natural watercourses with clearly defined bed and banks.

8. Middle Wheeling Creek flows to Wheeling Creek, which flows to the Ohio River, a traditionally navigable water.

9. Prior to August 2007, the two unnamed tributaries to Middle Wheeling Creek on Lot 13C were navigable waters and waters of the United States as those terms are defined in 33 U.S.C. § 1362(7) and 33 C.F.R. §328.3(a).

10. In December 2006, Respondent submitted to the Corps an application to discharge dredged and/or fill material to the two unnamed tributaries to Middle Wheeling Creek located on Lot 13C. The purpose of the proposed fill was to continue expansion of "The Highlands" by constructing a level pad for the construction of additional commercial development. On information and belief, the Corps informed Respondent that the December 2006 application was deficient, and the Corps did not issue a permit pursuant to Section 404 of

the CWA authorizing Respondent to discharge dredged and/or fill material to the two unnamed tributaries to Middle Wheeling Creek located on Lot 13C.

11. In August 2007, representatives of Respondent submitted to the Corps a jurisdictional determination form ("Respondent's JD form"). Respondent's JD form identified an unnamed tributary to Middle Wheeling Creek on Lot 13C, but asserted that the unnamed tributary was not a "water of the United States" as defined in 33 U.S.C. § 1362(7) and 33 C.F.R. § 328.3(a).

12. On information and belief, the Corps has not confirmed or approved the substance of Respondent's JD form.

13. On October 3, 2007, representatives of the Corps and EPA visited Lot 13C to investigate the representations set forth in Respondent's JD form. Upon arrival at Lot 13C, the representatives of the Corps and EPA discovered that the unnamed tributaries to Middle Wheeling Creek had been filled in with dirt and other earthen materials.

14. On information and belief, between August 2007 and October 3, 2007, Respondent and/or persons acting on behalf of or under the control of Respondent operated equipment which discharged dredged and/or fill material into approximately 1,622 linear feet of the two unnamed tributaries to Middle Wheeling Creek on Lot 13C.

15. On information and belief, the Corps has not authorized pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, the discharge of dredged and/or fill material into the two unnamed tributaries to Middle Wheeling Creek on Lot 13C.

16. By discharging dredged and/or fill material to the two unnamed tributaries to Middle Wheeling Creek on Lot 13C without authorization from the Corps of Engineers pursuant to 33 U.S.C. § 1344, Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311.

### III. ORDER ON CONSENT AND ASSESSMENT OF PENALTY

17. In order to resolve the violations described in Section II above, and to provide a legal framework for the payment of a penalty, EPA and Respondent enter into this ORDER ON CONSENT. Respondent consents to issuance of this CAFO and agrees to undertake all actions required by its terms and conditions. Respondent consents to the assessment of the civil penalty herein and consents to issuance of the compliance order contained herein.

18. Respondent admits the Findings of Fact, Jurisdictional Allegations and Conclusions of Law set forth in Section II, above, and waive any defenses it might have as to jurisdiction and venue. Respondent agrees not to contest EPA's jurisdiction to issue this Consent Agreement and Final Order (CAFO) and EPA's jurisdiction to issue Administrative

Order for Compliance on Consent, EPA Docket No. CWA-03-2008-0364DW, and not to contest EPA's jurisdiction to enforce the terms of this CAFO and the Administrative Order for Compliance on Consent, EPA Docket No. CWA-03-2008-0364DW.

19. Respondent hereby expressly waives its right to a hearing, pursuant to Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), on any issue of law or fact in this matter and consents to issuance of this CAFO without adjudication, and waives its right to appeal this final order pursuant to Section 309(g)(8)(B), 33 U.S.C. § 1319(g)(8)(B).

20. Each party to this action shall pay its own costs and attorney fees.

21. The provisions of this CAFO shall be binding upon the Respondent, and its officers, principals, directors, successors and assigns.

22. The parties agree that settlement of this matter prior to the initiation of litigation is in the public interest and that entry of this CAFO is the most appropriate means of resolving this matter.

23. Pursuant to Section 309(g)(4) of the Act, 33 U.S.C. § 1319 (g)(4), and 40 C.F.R. § 22.45(b), EPA is providing public notice and an opportunity to comment on the Consent Agreement prior to issuing the Final Order. In addition, EPA has consulted with the State of West Virginia regarding this action, and will mail a copy of this document to the appropriate West Virginia official.

24. Based on the foregoing FINDINGS, and having taken into account the factors listed in Section 309(d) of the CWA, 33 U.S.C. § 1319(d), including but not limited to, the nature, circumstances, extent and gravity of the violation, the Respondent's knowledge, culpability and history of violations, the economic benefit to Respondent, the ability of Respondent to pay the penalty, Respondent's compliance with Administrative Order for Compliance on Consent, Dkt. No. CWA-03-2008-0364DW, Respondent's agreement to submit within 45 days of the effective date of with Administrative Order for Compliance on Consent, Dkt. No. CWA-03-2008-0364DW to the U.S. Army Corps of Engineers Pittsburgh District a mitigation plan (including appropriate financial assurances) for discharges associated with Phases II and III of The Highlands that will provide mitigation of one acre of wetland resources, and other such matters as justice may require, the administrative record; and under the authority of Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), EPA HEREBY ORDERS AND RESPONDENTS HEREBY CONSENT:

25. Within thirty (30) days of the effective date of this ORDER, Respondents shall pay a civil penalty of \$ \$35,000 for the violations cited herein. This does not constitute a demand as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412. Penalty payment shall be made according to the following specifications.

a. The payment shall be made in U.S. dollars by money order, cashier's or certified check made payable to the "Treasurer, United States of America", wire transfer, or ACH, and delivered to the following:

If by money order, cashier's or certified check sent by U.S. postal service mail:

U.S. Environmental Protection Agency  
Box 371099M  
Pittsburgh, PA 15251

If by money order, cashier's or certified check sent by Federal Express or non-U.S. Postal Service express mail:

Mellon Client Service Center  
ATTN: Shift Supervisor, Room 0690  
Lockbox 371099M  
500 Ross Street  
Pittsburgh, PA 15262-0001

If by wire transfer:

Federal Reserve Bank of New York  
ABA=021030004  
Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York, NY 10045  
Field Tag 4200 of the Fedwire message should read:  
"D 68010727 Environmental Protection Agency"

If by ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency  
PNC Bank  
ABA = 051036706 Transaction Code 22 – checking  
Environmental Protection Agency 808 17<sup>th</sup> Street NW  
Account 3100006 Washington, DC 20074  
CTX Format Contact = Jesse White 301-887-6548

b. A copy of the check or money order or other proof of payment submitted in fulfillment of the penalty payment requirements of this order shall be sent to the following:

U.S. Environmental Protection Agency  
Regional Hearing Clerk (3RC00)  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

and

Mr. Todd Lutte (3EA30)  
U.S. EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

c. A transmittal message identifying the case name and docket number identified above shall accompany the remittance and copies of the check or transfer instrument.

26. Failure to pay the penalty assessed by this ORDER after its effective date subjects the Respondent to a collection action under Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9). The validity, amount and appropriateness of the penalty are not subject to review in a collection proceeding. 15 U.S.C. § 2615(a)(4)(A). Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest on unpaid penalties, and a charge to cover the cost of processing and handling a delinquent claim. Interest will begin to accrue on this civil penalty if it is not paid within fifteen days of the date due. Interest will be assessed at the rate of the United States Treasury tax and loan rate. 40 C.F.R. § 13.11. In addition, a quarterly nonpayment penalty charge may be assessed on any delinquent debt pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9). In addition, EPA will assess a \$15.00 administrative handling charge for the administrative handling charge for administrative costs for the first 30 day period after the payment is due and an additional \$15.00 for each subsequent 30 days the penalty remains due.

27. All notifications and approvals required by this CAFO, shall be made to:

Mr. Todd Lutte (3EA30)  
U.S. EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029  
Telephone: (215) 814-2099

28. All submissions provided pursuant to this Order shall be signed by Respondents and shall include the following certification:

"I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information,

including the possibility of fine and imprisonment for knowing violations."

#### 1.IV. GENERAL PROVISIONS

29. This CAFO shall not relieve Respondents of its obligation to comply with all applicable provisions of federal, state or local law and ordinance, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit. This CAFO does not constitute a waiver, suspension or modification of the requirements of the CWA.

30. Violations of the terms of this ORDER may subject Respondents to an administrative penalty of not more than \$11,000 for each day of violation up to a maximum penalty of \$157,500, and/or civil action in a United States district court with penalties up to \$32,500 per day of violation as authorized in and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19.

31. This Consent Agreement and the accompanying Final Order resolve only the civil claims for the specific violations alleged herein. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. In addition, this settlement is subject to all limitations on the scope of resolution and to the reservation of rights set forth in Section 22.18(c) of the Consolidated Rules of Practice. Further, EPA reserves any rights and remedies available to it under the Clean Water Act, 33 U.S.C. §§ 301 *et seq.*, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this CAFO, following its filing with the Regional Hearing Clerk.

32. Nothing in this CAFO shall be construed as prohibiting, altering or in any way eliminating the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violations of this CAFO or of the statutes and regulations upon which this CAFO is based or for Respondent's violation of any applicable provision of law.

33. The penalty described in Paragraph 25, above, shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

34. This CAFO is conditioned upon the accuracy of the Respondent's representations to EPA, including but not limited to Respondents' intent to comply with Administrative Order for Compliance on Consent, EPA Dkt. No. CWA-03-2008-0364DW. EPA reserves the right to institute a new and/or separate action should Respondents fail to comply with the terms of this CAFO or Administrative Order for Compliance on Consent, EPA Dkt. No. CWA-03-2008-0364DW. That right shall be in addition to all other rights and causes of action, civil or criminal, the EPA may have under law or equity in such event.

35. The undersigned representative of Respondent certifies that he or she is fully

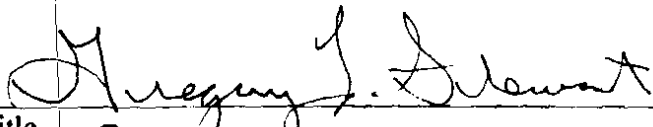
authorized by the party represented to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

36. All of the terms and conditions of this CAFO together comprise one agreement, and each of the terms and conditions is in consideration of all of the other terms and conditions. In the event that this CAFO, or one or more of its terms and conditions, is held invalid, or is not executed by all of the signatories in identical form, or is not approved in such identical form by the Regional Administrator or his designee, then the entire CAFO shall be null and void.

V. EFFECTIVE DATE


37. This ORDER will be issued after a forty (40) day comment period, execution by an authorized representative of the EPA and filing with the regional hearing clerk. It will become final and effective 30 days after issuance.

FOR RESPONDENT  
OHIO COUNTY DEVELOPMENT AUTHORITY:

  
Title Secretary - Treasurer

9/26/08  
Date

FOR COMPLAINANT:


  
John R. Pomponio, Director  
Environmental Services Division  
U.S. Environmental Protection Agency  
Region III

11/17/08  
Date



SO ORDERED in *Matter of Ohio County Development Authority*, Dkt. No. CWA-03-2009-0020,  
pursuant to 33 U.S.C. § 1319(g) and 40 C.F.R. Part 22.

DEC 02 2008  
this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

  
Donald S. Welsh  
Regional Administrator  
U.S. Environmental Protection Agency  
Region III